Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

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Quarterly Production and Activity Report

January 1 through March 31, 2005

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Production Summary

- The active inventory totalled 5,168 (29% over the target of 4,000 cases).
- Incoming appeals numbered 1,134; of these, 981 were appeals from WSIB decisions and 153 appellants advised they were ready to proceed to hearing following a period of inactive status.
  - This compares to 961 new appeals and 164 reactivated appeals recorded in the fourth quarter of 2004.
  - In 2004, the weekly average of hearing ready appellants was 74. For Q1 2005, the weekly average of hearing ready appellants was 62. This figure excludes cases reactivated from the Inactive status.
- Dispositions numbered 1,138; this includes 458 dispositions in the pre-hearing areas resulting from dispute resolution efforts and 680 after hearing dispositions; of the after hearing dispositions, 662 followed from Tribunal decisions.
- The inactive inventory increased by 45 cases to 4,184.
- 81% of final decisions were released within 120 days.
- Due to a lack of adjudicative resources, the Appeals Tribunal is currently unable to offer hearing dates within four months of the appellant confirming hearing readiness by filing a Confirmation of Appeal form.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are currently being tracked as part of the Tribunal's case management. Most are expected to close as abandoned appeals after a two-year period expires. At the end of the first quarter of 2005, the notice inventory included 1,551 dormant cases, the active inventory totaled 5,168 cases, and the inactive inventory totaled 4,184 cases.

Production Charts

A. Active Inventory[1]

Period	Active Inventory
Q1-2004	4808
Q2-2004	5102
Q3-2004	5150
Q4-2004	5194
Q1-2005	5168

The active inventory is expected to continue at this level as the Tribunal is relying heavily on a small number of adjudicators to release decisions.

B. Incoming Appeals

Period	Incoming Appeals
Q1-2004	1169
Q2-2004	1157
Q3-2004	1055
Q4-2004	1125
Q1-2005	1134

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q1-2004	969	400	569
Q2-2004	1139	516	623
Q3-2004	982	425	557
Q4-2004	1120	472	648
Q1-2005	1138	458	680

[1] Minor differences from the previous quarter result from ongoing file work.

D. Inactive Inventory

Period	Inactive Inventory
Q1-2004	4187
Q2-2004	4195
Q3-2004	4193
Q4-2004	4139
Q1-2005	4184

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q1-2004	1819	
Q2-2004	1543	-276
Q3-2004	1568	25
Q4-2004	1531	-37
Q1-2005	1551	20

The Tribunal inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management.

Communications

Public Information Sessions – In February, the Tribunal invited stakeholders to an information session in Kitchener-Waterloo. There were sixty-eight (68) in attendance.

Training – Also in February, Tribunal staff organized a training day for adjudicators. The day featured Mr. Justice John Laskin, who provided a presentation on decision writing, and small group workshops, facilitated by Tribunal OICs and staff. A smaller training day took place in March, discussing medical issues.

Judicial Review Activity

During this quarter, the Court of Appeal heard an appeal of a Divisional Court decision, which had quashed a decision of the Tribunal. This appeal had particular significance. In its almost twenty years of existence, the Tribunal had never before had one its decisions quashed on judicial review. As set out under item #1 below, the Court of Appeal allowed the Tribunal's appeal, set aside the decision of the Divisional Court, and reinstated the decision of the Tribunal. In addition to restoring the Tribunal's record of never having been successfully judicially reviewed, the Court of Appeal decision establishes an important precedent for future applications for judicial review of Tribunal decisions.

The status of applications for judicial review and other court matters involving the Tribunal as of for the first quarter of 2005 are also set out below. Only those judicial reviews where there was activity during the quarter are listed below. There are a number of other pending judicial reviews in which there was no action during this particular quarter.

Judicial Reviews

1. Decisions Nos. 770/98I (October 27, 1999) and 770/98IR (February 5, 2002)

In the last quarterly report, it was noted that the Court of Appeal had granted leave to appeal the only Divisional Court decision, which had ever quashed a Tribunal decision on judicial review. The Court of Appeal heard the appeal on March 15, 2005. The Panel of MacPherson, Cronk and Whalen released its decision on April 7, unanimously granting the Tribunal's appeal.

This case involves worker who was granted chronic pain entitlement by the Board, but was awarded no future economic loss. She appealed this to the Tribunal, alleging she did not have chronic pain, but instead had an organic condition known as traumatic vertebrobasilar ischemia (TVBI). The Tribunal dismissed the appeal, and confirmed the worker had chronic pain. In coming to

this finding, the Panel concluded the worker had hit her head once at the time of her accident.

The worker then requested the Tribunal reconsider the finding in *Decision 770/98I* that she had an organic condition. She also argued in the alternative, as a new issue, that she had a somatoform disorder. In support of her reconsideration the worker submitted an affidavit from a co-worker. The affidavit said the co-worker could now recall that in 1991 the worker had struck her head twice at the time of the accident. In *Decision 770/98IR*, the Panel denied the reconsideration, and confirmed the worker did not have TVBI. However, the Panel found that the worker had a somatoform disorder, rather than chronic pain.

The worker applied for judicial review of the decision that she did not have an organic condition.

The judicial review was heard in Divisional Court on April 19, 2004. The Court found the Tribunal's decision was patently unreasonable. The Divisional Court's decision, which is not long, focused on two paragraphs of the reconsideration decision. The Court was not satisfied about the way the Panel had dealt with the co-worker's affidavit on the reconsideration in regards to the number of times the worker had struck her head. The Divisional Court decision also stated that the Tribunal had not satisfactorily dealt with the conflict in the medical evidence.

At the Court of Appeal the Tribunal took the position that the Divisional Court had failed to appreciate the Tribunal's decision was written the way it was because it was a reconsideration of its first decision. The test on a reconsideration is whether there was good reason to believe there was a significant defect in the decision that would change the result of the original decision. Further, the Tribunal argued the reasons provided by the Panel in rejecting the affidavit were more than adequate, and the decision was certainly not patently unreasonable.

The Court of Appeal granted the Tribunal's appeal. MacPherson J., writing for the Court, reaffirmed the standard of review was patent unreasonableness. He stated that the Divisional Court had erred in its conclusion that the Tribunal decision should be quashed. Contrary to the findings of the Divisional Court, the Court of Appeal found the Tribunal's decision had focused on the correct issue; that it had sufficiently explained the rejection of the affidavit evidence; and the Tribunal had dealt extensively with all the medical evidence and had explicitly resolved the conflicting opinions of the physicians.

The Court of Appeal stated:

> "The Tribunal carefully considered all the evidence and reached, and explained, its decision. In short, the Tribunal did precisely what it was supposed to do. "

The Court of Appeal set aside the decision of the Divisional Court and reinstated the final decision of the Tribunal.

2. Decision No. 1384/03 (December 30, 2003)

The worker and her sister were suspended for smoking at work. The sister reported an accident later that day, before the suspension took effect. The worker reported a sudden accident within two hours of returning after her suspension. In addition the worker claimed she had suffered an accident by disablement as a result of the repetitive nature of her work. The Panel reviewed the medical evidence and the testimony of the witnesses and denied initial entitlement to the worker. Both the worker and her sister commenced separate applications for judicial review.

The Tribunal filed its factum. The judicial review was scheduled to be heard on April 6, 2005.

3. Decisions Nos.1584/02 (July 15, 2003) and 1584/02R (June 16, 2004)

The worker, a car salesman, had a congenital lesion in his brain which was asymptomatic until 1993. In 1991 he suffered a head injury when the rear door on a van was accidentally shut on his head. The worker did not seek any medical attention for this injury. Eighteen months later the worker had a seizure, and alleged it was caused by head injury. The Panel denied the worker's appeal, finding there was no entitlement for the seizures.

The worker has brought an application for judicial review. The Tribunal filed its factum in January 2005. It is anticipated that this judicial review will be heard in the fall of 2005.

4. Decision No. 117/04 (September 27, 2004)

This right to sue application found the injured party was a worker, rather than an independent operator, and that the right of action was therefore taken away. The worker was a courier. Counsel for the worker has commenced an application for judicial review. At the end of the quarter the Tribunal had received the Applicant's factum, and it is anticipated that the Tribunal will serve its factum early in the next quarter.

Other Court Actions

Stabryla v. Valli and Josefo

> The worker had some slurry spilled on him at work in 1988. The worker subsequently claimed entitlement for psychotraumatic disability, which was denied by the WSIB. His appeal to the Tribunal was denied by a Panel of Josefo, Sherwood and Briggs in *Decision 583/02*.

The worker then commenced an action in Kirkland Lake Small Claims Court against an adjudicator of the WSIB in Sudbury and Tribunal Vice-Chair Jay Josefo. It appears the reason for the action was the worker's unhappiness with the denial of his appeal. The Tribunal and the WSIB filed statements of defense. Following receipt of the statements of defense, the worker withdrew his action.

Highlights of Released Decisions

Merit Adjusted Premium Program (MAPP): Decision No. 1062/02 is the first Tribunal case to look at the new experience rating program for small employers (MAPP). It is of particular interest due to its discussion of the possible retroactive elements of MAPP. To calculate assessments for 1998, MAPP relied on an employer's accident history from 1994 to 1996. The employer was not arguing an error in the assessment but rather was requesting that the Tribunal rule on the legal validity of MAPP itself, in particular whether the program is retroactive in nature. Under subsection 123(2), the Tribunal has jurisdiction to hear appeals on increases or decreases in an employer's premium based on an experience rating program, but not the establishment or method of the program. Since the Divisional Court had accepted the Board's submission in a related court case that the Tribunal had jurisdiction to hear the matter, the Panel also accepted that it had jurisdiction to consider the issues raised in the employer's appeal. The Panel held that the presumption against retroactive effect did not apply to the introduction of the new experience rating program, since MAPP uses the employer's past record to determine the cost risk associated with an employer and thereby increase or reduce current and future assessments. The introduction of MAPP was within the Board's powers.

Charter Jurisdiction and Same-sex Survivor Benefits: Decision No. 897/02R considered whether the Tribunal has jurisdiction to deal with a Charter argument raised in response to a Board reconsideration request. Board reconsideration requests are relatively rare and are subject to the Tribunal's standard threshold test in all reconsideration requests of whether it is advisable to reconsider the decision. The Panel reviewed Decision No. 794/97, which had previously considered the Tribunal's Charter jurisdiction, and the Supreme Court of Canada's decision, *Nova Scotia (Workers' Compensation Board) v. Martin*. The Panel reconfirmed the Tribunal's jurisdiction to consider the Charter, and concluded that the obligation to apply Board policy pursuant to s. 126 of WSIA did not rebut this presumption. In this case, Decision

No. 897/02 granted survivor benefits to the same-sex partner of a worker who died in 1996. The Board is asking for reconsideration on the grounds that same-sex partners of workers who died prior to March 1, 2000 are not entitled to survivor benefits under the pre-1997 Act. The deceased worker's same-sex partner argues that this "cut off" date contravenes s. 15 of the Charter. The hearing will reconvene on the threshold test and merits of the Board's reconsideration request, as well as the Charter argument.

Partial FEL Benefits and CPP: Decision No. 1875/03 is the most recent in a series of cases to consider the Board's practice of offsetting Canada Pension Plan (CPP) disability benefits from partial FEL awards. The Vice-Chair noted that the Board is currently reviewing this practice and is considering treating CPP benefits as earnings rather than offsetting them from partial FEL awards; however, this proposed change has not yet been implemented. The Vice-Chair followed the majority line of Tribunal decisions that have found the current practice of offsetting CPP benefits from partial FEL awards consistent with the Act and Board policy. The Vice-Chair also dismissed the worker's argument that this practice contravened s. 94A of The Constitution Act, 1867, concluding that this provision did not prevent provinces from passing laws that took into account the existence of the federal CPP scheme.

Earnings Basis: Decision 951/04 contains an interesting discussion of how long-term earnings basis for LOE benefits should be calculated in an irregular employment situation. Under Board policy, if a worker is irregularly employed (e.g. just started the job with the employer) the worker's average earnings for the past two years are used rather than the short-term average earnings. The policy provides for exceptions where the short-term average earnings are also used for the long-term calculation; for example, where it is the worker's first job or the worker has been absent from the workforce for the past two years. The Panel held that despite the fact that the worker had been employed in the previous two years, the worker's job with the employer was analogous to the examples provided in the policy. The Panel took into account the worker's young age, the fact that he had not completed high school and also that he had drifted from job to job until deciding to pursue a career in roofing. The worker's first job as a roofer was with the employer and was his first "real" job.